85-1893

No.

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL HENRY EISENBERGER,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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HIPJ

QUESTION PRESENTED FOR REVIEW

Whether drug enforcement officers who lack probable cause or a warrant to search a vehicle can cause uniformed officers to stop the vehicle on the pretext of a routine traffic violation when their ulterior motive for the stop is to determine if their suspicions regarding the vehicle's contents can be confirmed?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

PAUL HENRY EISENBERGER,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

COMES NOW Petitioner, PAUL HENRY EISENBERGER, by and through his undersigned counsel of record, and respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia affirming Petitioner's conviction on January 23, 1986, rehearing denied February 5, 1986.

OPINIONS BELOW

Petitioner was convicted of improper lane usage (O.C.G.A. §40-6-123) and trafficking in marijuana (O.C.G.A. §16-13-31[c][2]) in a non-jury trial in the Superior Court of Cobb County, Georgia June 1, 1984. Prior to his conviction, on May 17, 1984 that court denied Petitioner's motion to suppress the warrantless search of his vehicle which relied on the Fourth Amendment to the United States Constitution. (Appendix A). Petitioner was sentenced to serve twelve (12) years in prison and fined $50,000. On January 23, 1986 the Court of Appeals of Georgia affirmed Petitioner's conviction and sentence. (Appendix B). On February 5, 1986 the Court of Appeals denied Petitioner's motion for rehearing. On March 5, 1986, the Supreme Court of Georgia denied

Petitioner's Application for Writ of Certiorari, and on March 18, 1986 reconsideration was denied, with three of that court's seven justices dissenting.

JURISDICTION

In the criminal trial below, Petitioner challenged the legality of the warrantless search of the vehicle he was driving at the time of his arrest. This challenge was based on Petitioner's contention that the search violated Petitioner's rights under the Fourth Amendment to the United States Constitution. The trial court denied Petitioner's motion to suppress regarding this search, and the Court of Appeals of Georgia affirmed the trial court's order, holding that the search was not contrary to the Fourth Amendment. The Supreme Court of Georgia subsequently denied Certiorari.

The jurisdiction of this Honorable Court rests on 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

The warrantless search of Petitioner's vehicle and his subsequent arrest on the charges relating to the large quantity of marijuana (approximately 2700 pounds) discovered by the officers came as a result of a Georgia Bureau of Investigation (G.B.I.) surveillance which had begun the pre-

vious day in Valdosta, Georgia (T-13-15).[1]

Because of the suspicious nature of a different motorhome at that location, officers followed a suspected marijuana smuggler (T-26) in that vehicle and observed him meet with Petitioner in his vehicle, also a motorhome (T-59). No exchange of anything or suspected contraband was seen by any officers (T-59), but both vehicles were followed. Various G.B.I. agents trailed Petitioner's vehicle constantly from Gainesville, Florida to the vicinity of Atlanta, Georgia, a distance of over 300

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1. Citations to the trial transcript are referenced by "T-" followed by the relevant page number; citations to the transcript of the hearing on Petitioner's motion to suppress are referenced by "T-MH" followed by the page number.

miles, observing it to drive at varying speeds, always under 55 miles per hour, and appearing to be heavily loaded (T-MH-21-25).[2]

Just south of the city, agents from the G.B.I.'s Atlanta office joined the surveillance, by then consisting of four unmarked vehicles (T-MH-29-30). Due to the lateness of the hour, and the realization that they had no arrest powers outside the State, the Atlanta agents

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2. Interestingly enough, the second vehicle was also subsequently searched by the agents. It was followed to a motel in Valdosta, Georgia where it was observe until the following morning, when a search warrant was obtained. The principal basis for the warrant was the officers' observations that it, like Petitioner's vehicle, was "heavily loaded" (T-27, 34-35). When the warrant was executed, the vehicle was found to be empty. Tests conducted on Petitioner's vehicle also showed conclusively that the weight carried therein caused no visible effect on the vehicle's outward appearance (MH-117-129).

decided to pull the vehicle over to determine if it was carrying drugs (T-MH-28). They testified that there was a "predetermined plan" to pull the vehicle over somewhere in the Atlanta vicinity (T-MH-75, 82).

In order to initiate this plan, the agents radioed for assistance from the Georgia State Patrol (T-MH-11). A Georgia State Patrol car received the call and responded. Based on information provided, the hour, and identity of the pursuing officers, the troopers assumed they were called "because the vehicle was suspected of having narcotics onboard..." and that the request came to them because "...they [the G.B.I.] know that we are capable of deciding what makes a good stop." (T-MH-104-105).

Shortly after the Georgia State Patrol car joined the parade of cars following Petitioner's van, the troopers and the G.B.I. agents observed a lane violation.[3] According to the Georgia State Patrol trooper, it was because of this traffic violation that their blue light was turned on and Petitioner's vehicle was pulled over (T-MH-95-96). As the Georgia State Patrol car affected its "traffic" stop, an unmarked G.B.I. car simultaneously cut across in front of Petitioner, forcing him to the side of the road (T-MH-32-33, 148).

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3. The testimony as to the alleged lane violation was extremely contradictory, especially as to the Georgia State Patrol trooper's supposed observation of another vehicle being cut off (T-MH-109-110), which was denied by all the other witnesses (T-31, T-MH-86-87) and which was not noted in her written report (T-MH-109-110) but mysteriously appeared sometime later on the trooper's (but not the Court's) copy of the traffic ticket (T-137, EXHIBIT D-2 at T-256).

Immediately after the stop, the G.B.I. agents went to the driver's door, which they restrained Petitioner from closing after he exited the vehicle (T-MH-14, 69, 149). After Petitioner's driver's license and registration were checked, the officers ordered Petitioner to move away from his vehicle. When he refused, Petitioner was forcibly removed, and placed in the back of the Georgia State Patrol car (T-MH-39-40; 67; 101-102).

During this time, the agents testified that they smelled the "strong odor" of marijuana emanating from the van (T-MH-18, 72). As a result of this smell, coupled with their previous observations during the 300 mile surveillance, and Petitioner's "nervous" behavior, they entered the van, searched it, and seized the marijuana inside

(T-MH-18, 72). Petitioner was arrested for violation of the Georgia Controlled Substance Act, and was also charged with improper lane usage (O.C.G.A. §40-6-123) (T-MH-18, T-36).

On cross-examination, the G.B.I. case agent indicated that prior to the traffic stop of Petitioner's vehicle, "...we really didn't have any probable cause to get into the vehicle had he [Petitioner] not done what he had done, and had I not smelled marijuana." (T-MH-35).

Petitioner's motion to suppress challenging the constitutionality of this warrantless search was denied by the trial court after two days of evidentiary hearings (R-66-67). In its written order, the trial court held that the search was justified under the "automobile exception" to the warrant

requirement because the agents had probable cause to search based on their observations of the vehicle coupled with the odor of marijuana coming from the inside of the van. In regard to the legality of the traffic stop, the trial court held: "The initial stop of the vehicle by the Georgia State Patrol pursuant to a traffic violation was both lawful and proper. A citation was issued for improper lane usage, a violation of O.C.G.A. §40-6-8 [sic]." (Appendix A). On appeal, the Court of Appeals upheld the trial court's decision, based on its conclusion that since "...there was sufficient evidence to support a conviction on the charge of improper lane changing, we must conclude that the stop of the vehicle was justified." (Appendix B). In the alternative, the court indicated that

the stop of the vehicle was "authorized based on the existence of a reasonable and articulable suspicion that it was being used to transport marijuana." (Id.).

It is as to this single issue relating to the legality of the warrantless search of Petitioner's vehicle that Petitioner respectfully petitions this Court for Certiorari to the Court of Appeals of Georgia.

REASONS FOR ALLOWING THE WRIT

The ruling of the Court of Appeals of Georgia in upholding the legality of the warrantless search of Petitioner's van is contrary to this Court's pronouncements on actions taken by law officers which are demonstrated to be pretextual in nature. A search is unconstitutional as the product of a "pretext arrest" when the officer pretends to arrest for one, legally

sufficient, reason but is in fact taking the action in order to bring about the search for evidence of another crime, as to which probable cause is lacking.

This Court, beginning with its decision in United States v. Lefkowitz, 285 U.S. 452 (1932), has made clear its view that pretexts are constitutionally unacceptable. This precept has been applied and discussed in a number of varying situations and circumstances by this Court. See, e.g., Abel v. United States, 362 U.S. 217 (1960); Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J. concurring); United States V. Robinson, 414 U.S. 218, 221 n. 1 (1973); Wainwright v. City of New Orleans, 392 U.S. 598, 606-607 (1968) (Warren, C.J. disseting); Jones v. United States, 357 U.S. 493 (1958); United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissent-

ing). Most recently, in South Dakota v. Opperman, 428 U.S. 364 (1976), this Court, in approving as constitutional the practice of inventory searches of automobiles, carefully distinguished away as clearly impermissible those automobile searches which might look like inventory searches but which were in reality a "pretext concealing an investigatory police motive." Id., at 376.

The need for continued vigilence in regard to such police activity is in keeping with this Court's emphasis that the principal viable justification for the exclusionary rule is its deterrent effect. See, e.g., Stone v. Powell, 428 U.S. 465, 484-88 (1976); United States v. Leon, 104 S.Ct. 3405, 3415-16 (1984). The "dissipation of the taint" concept that this Court has applied to uphold certain types of searches is peculiarly

inapplicable to searches pursuant to a pretext arrest. Dunaway v. New York, 442 U.S. 200, 218 (1979); Brown v. Illinois, supra, at 603-604. In a concurring opinion, Justices Powell and Rehnquist note the pretextual arrest as an example where "...the deterrent value of the exclusionary rule is likely to be effective, and the corresponding mandate to preserve judicial integrity [cities omitted] clearly demands that the fruits of official misconduct be denied." Id., at p. 611.

Petitioner's case squarely presents this issue of such a pretextual arrest.[4]

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4. While the Court of Appeals of Georgia in its opinion affirming Petitioner's conviction (Appendix B) advanced an alternative basis for upholding the warrantless search (indicating that the stop was alternatively justified by reasonable and articulable suspicion), a (con't.6)

The agents who had tailed Petitioner's van some 300 miles suspected it was carrying contraband. However, as the lead agent candidly admitted, before Petitioner's van was pulled over and the ensuing events occured, "...we really didn't have any probable cause to get into the vehicle..." (T-MH-35). Nonetheless, a "predetermined" plan was

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careful review of the written order of the trial court denying Petitioner's motion to suppress (Appendix A) demonstrates that this basis was foreclosed by a factual finding made by the trial court. That order, and the record below, show that the trial court resolved a clear conflict in the evidence as to the reason for the stop of the vehicle by finding that the stop was made "by the Georgia State Patrol pursuant to a traffic violation..." Id. This resolution of the conflicting evidence by the trial court must be accepted unless it was clearly erroneous, which the Court of Appeals did not find. Lego v. Twomey, 404 U.S. 477 (1972). As a consequence, the only question to be decided to determine the legality of this search is whether or not the arrest in these circumstances for a traffic violation was a constitutionally impermissible pretext.

agreed on to pull Petitioner's vehicle over in either Fulton or Cobb County (T-75-82), and, in order to put this plan in motion, the G.B.I. agents called in a Georgia State Patrol marked vehicle (T-MH-11). On the basis of radio communications and "some things you just know" (T-MH-105) the responding Georgia State Patrol troopers arrived, with the intent of stopping the vehicle for the G.B.I. agents, because "they know we are capable of deciding what makes a good stop." (T-MH-105; T-MH-94-95; T-MH-113). Shortly thereafter, Petitioner's vehicle was stopped, by both the Georgia State Patrol and the unmarked G.B.I. cars, allegedly for a lane violation (T-136). The G.B.I. agents immediately approached the vehicle, smelled marijuana, forcibly placed Petitioner in the back of a patrol car, and searched

the vehicle, confirming their suspicions that the vehicle was full of marijuana (T-18, 72).

No clearer record of the officers' ulterior motive for initiating a traffic stop could be presented. A deliberate decision was made to stop the vehicle despite their admitted lack of probable cause; a request for uniformed assistance to make a traffic stop was broadcast; and the subsequent traffic stop yielded an odor of marijuana to the drug enforcement officers, thereby justifying their search. In such circumstances, the arrest or stop, no matter how lawful, cannot support such a search.

The various federal courts of appeal and several federal district courts which have treated the subject of pretext arrests and interpreted this Court's pronouncements in Lefkowitz,

supra and other cases, have all rendered decisions with which the deterimination of the Court of Appeals of Georgia in Petitioner's case clearly conflicts.

In Worthington v. United States, 166 F. 2d 557 (6th Cir. 1948), the Court of Appeals held that: "Where an arrest is only a sham or front being used as an excuse for making a search, the arrest itself and the ensuing searches are illegal." Whether or not the grounds for the initial arrest were legally justified, if the action is taken by the officer with an ulterior motive of obtaining evidence or grounds to support other unrelated charges, the initial arrest is illegal as a pretext or subterfuge, and the resulting evidence must be suppressed as being seized in violation of the Fourth Amendment. Amador-Gonzalez v. United States, 391 F. 2d 308 (5th Cir. 1968).

Other federal courts, applying the principle first enunciated in Lefkowitz, supra, have found unconstitutional searches such as the one in Petitioner's case. See e.g., Taglavore v. United States, 291 F. 2d. 262 (9th Cir. 1961) (arrest of a man on outstanding traffic warrant as an excuse to follow up on a tip he possessed marijuana cigarettes held illegal); Amador-Gonzalez, supra (stop of suspected drug trafficker's car for improper left turn and speeding held illegal because the real purpose of the officers was to search defendant's car); Blazak v. Eyeman, 339 F. Supp. 40 (D.Ariz. 1971) (stop of defendant to arrest for driving with suspended license to verify tip that defendant possessed marijuana held illegal); United States v. Keller, 499 F. Supp. 415 (N.D. Ill., 1980) (stop of defendant's vehicle for violation of

city ordinance requiring front license plate caused subsequent search to be found illegal because of pretextual nature of stop). In a case almost identical to Petitioner's, United States v. Millio, 588 F. Supp. 45 (W.D.N.Y. 1984), that court held the stop of a suspect's car by a uniformed officer for a traffic violation which led to the discovery of an illegal weapon was unconstitutional because "the investigative stop was a pretext," since it was initiated by plainclothed agents who had been surveilling the suspect for a period of time and who called the uniformed officers in for the express purpose of stopping the suspect's car for a traffic violation.

For all the foregoing reasons, it is respectfully submitted that Petitioner's case is sufficiently important to justify review by this Court. Addi-

tionally, it is respectfully submitted that Petitioner's case should be accepted in light of this Court's decision in January of this year to grant certiorari in case number 85-803, Missouri v. Blair. In Missouri v. Blair, 691 S.W. 2d 259 (1985), the Missouri Supreme Court upheld the granting of a motion to suppress evidence seized as a result of a pretextual traffic arrest on the basis of the trial court's conclusion that the arrest was pretextual and therefore illegal. In making this decision, the court relied on this Court's holding in Lefkowitz, supra, and also cited the ruling of the court in United States v. Millio, supra. As a consequence, it is clear that this Court's re-examination of this doctrine of pretextual arrests in the upcoming session will be determinative of the legality of the search of Petitioner's

vehicle in the instant case, and for that added reason, Petitioner's case should be accepted by this Court.

Wherefore, Petitioner respectfully urges this Honorable Court to grant the instant Petition for Writ of Certiorari to the Court of Appeals of Georgia.

Respectfully submitted,

James K. Jenkins

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Attorney for Petitioner

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APPENDIX A

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	CRIMINAL INDICTMENT
	)	No. 84-0307
PAUL HENRY EISENBERGER	)	

Defendant, Paul Henry Eisenberger, having moved the Court through his motion filed April 5, 1984, and oral argument on April 18 and 19, 1984, for an order suppressing certain evidence seized by the State on January 17, 1984 for alleged violations of the State and Federal Constitutions, as well as O.C.G.A. §§17-5-1 and 17-5-30; and it appearing to the Court after argument of counsel, citation of authorities, and after review of the complete record, that the seizure by the State was lawful and constitutionally permissible, it is

ORDERED, that the motion of the Defendant is hereby denied.

The Court finds as follows:

The decision in U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 572 (1982), is controlling in this case. In Ross, supra, the Court held that

> "...police officers - who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it - may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view."

This search is justified on the basis of the automobile exception to the warrant requirement. Confer Ross, supra. Thus the issue, as to whether the scope of a search incident to an arrest (O.C.G.A. §17-5-1) was exceeded in this case as contended by the Defendant in his motion, is rendered moot.

The two prong test in Ross, supra,

i.e., a legitimate stop and probable cause, has been met in the case sub judice. The initial stop of the vehicle by the Georgia State Patrol pursuant to a traffic violation was both lawful and proper. A citation was issued for improper lane usage, a violation of O.C.G.A. §40-6-48.

The second prong of the test, the probable cause determination, is somewhat more complex. G.B.I. Agent John Lang had the vehicle under surveillance on the basis of information received from the agents in Albany, Georgia namely, the Defendant had met in Florida with a known smuggler. (Preliminary hearing transcript at pp. 15 and 16.) Agent Lang testified that he observed the vehicle swaying from side to side and that it appeared to be heavily loaded. (Transcript at p. 18.) Later, after the vehicle was stopped by the Georgia State Patrol, the Defendant opened the door, and the agents Lang and Jackson smelled the odor of marijuana coming from the interior of the van. (Transcript at

pp. 2 and 43.) All these facts considered together create a totality of circumstances establishing probable cause within the holdings of Illinois v. Gates, 103 S.Ct. 23 (1983), Holmes v. State, 163 Ga. App. 753 (1982), Rogers v. State, 131 Ga. App. 136 (1974).

Since the terms and conditions of the Ross test have been met in the case at bar, the Court finds that the warrantless search of Defendant's vehicle and the subsequent seizure of the evidence by the State was reasonable within the meaning of State and Federal law.

THIS the 17th day of May, 1984

/S/
P. HARRIS HINES, Judge
SUPERIOR COURT,
COBB JUDICIAL CIRCUIT

APPENDIX B

In the Court of Appeals of Georgia. Jan. 23, 1986

71719. EISENBERGER v. THE STATE. BA-15.

BANKE, Chief Judge.

The defendant was convicted of improper lane changing and in trafficking in marijuana. On appeal, he contends that the trial court erred in denying his motion to suppress as evidence 2,700 pounds of marijuana which were seized from his Winnebago motor home after its ostensible detention on the charge of improper lane changing. He further contends that the evidence was insufficient to support his conviction of the latter offense.

The salient facts in this case are quite similar to those in State v. Misuraca, 157 Ga. App. 361 (276 SE2d 679) (1981). Here, as there, the state's witnesses testified that, on the basis of information received from other law enforcement officers to the effect that the defendant had met with a known marijuana

smuggler in Florida, they followed the defendant's vehicle as it proceeded north through Georgia and observed that it appeared to be overloaded, in that it sat low on its axles and swayed from side to side. One of the officers following the vehicle decided on the basis of these factors that the vehicle should be detained before it left the state. Officer Rigo of the Georgia State Patrol testified that she and her partner were part of the surveillance effort and consequently knew the vehicle was suspected of carrying contraband but that the immediate reason for stopping it was the driver improperly changed lanes by cutting in front of another vehicle without signalling. The state's witnesses testified that, after stopping the defendant's vehicle, they perceived a strong odor of marijuana emanating from within. A subsequent search, conducted after the defendant had been escorted to one of the police vehicles, resulted in the seizure of

approximately 2,700 pounds of marijuana.

Held:

1. When a case is tried before the trial judge without a jury, as was this case, it is the judge's duty to weigh the evidence and determine the credibility of the witnesses. From our review of the record and transcript, we conclude that the evidence was sufficient to enable a rational finder of fact to find the defendant guilty of improper lane changing (OCGA §40-6-123) beyond a reasonable doubt. See generally Parker v. State, 161 Ga. App. 478 (288 SE2d 297) (1982).

2. The defendant contends vigorously that the charge of improper lane changing was used merely as a pretext to stop him when there otherwise existed no lawful reason to do so. Citing such cases as United States v. Lefkowitz, 285 U. S. 452 (52 SC 420, 76 LE2d 877) (1932); Worthington v. United States, 166 F2d 557 (6th Circ. 1948); United States v. Harris, 321 F2d 739 (6th Cir. 1961); Blazak v.

Eyeman, 339 FSupp. 40 (D.Ariz. 1971); United States v. Keller, 499 FSupp. 415 (N.D.Ill. 1980); and United States v. Miller, 588 FSupp. 45 (W.D.N.Y. 1984), he argues that the initial stop was consequently unlawful. However, as we have held in Division 1, supra, that there was sufficient evidence to support a conviction on the charge of improper lane changing, we must conclude that the stop of the vehicle on that charge was justified. We further hold that the stop of the vehicle was authorized based on the existence of a reasonable and articulable suspicion that it was being used to transport marijuana. The GBI officers who were present when the vehicle was stopped knew that it was traveling north after the driver had met with a known marijuana smuggler, and they had observed that it was so heavily loaded that it rode low on its axles and swayed from side to side.

"A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while

obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Adams v. Williams, 407 U.S. 143 (92 SC 1921, 32 LE 612) (1971). "An authorized officer may stop an automobile and conduct a limited investigative inquiry of its occupants, without probable cause, if he has reasonable grounds for such action—a founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harrassing." State v. Misuraca, supra, 157 Ga. App. at 364. Under all the circumstances, the trial court was clearly authorized to conclude that the initial stop of the vehicle was not arbitrary or harassing.

Judgment affirmed. Birdsong, P. J., and Sognier, J., concur.

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vs.

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Respondent.

SUPPLEMENTAL APPENDIX

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Appendix D

Court of Appeals of the State of Georgia

Atlanta, February 5, 1986

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

71719 Paul Henry Eisenberger v. The State (9-84-0307)

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it is hereby denied.

February 5, 1986

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk
Clerk

Appendix E

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 3/5/86

Case No. 43223. Eisenberger v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J., who dissents.

Very truly yours,

Mrs. Joline B. Williams
Clerk

Appendix F

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Dear Sir: Atlanta 3/18/86

The motion for a reconsideration was denied today:

Case No. 43223. Eisenberger v. The State.

Hill, C.J., Smith and Bell, dissent.

Very truly yours,

Mrs. Joline B. Williams,
Clerk

Supreme Court, U.S.
FILED
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CLERK

(3)

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PAUL HENRY EISENBERGER,
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v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

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QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to review the denial of a motion to suppress when over 2,700 pounds of marijuana was discovered in the Petitioner's motor vehicle subsequent to the Petitioner's lawful detention pursuant to a traffic violation?

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No. 85-1893

In The

Supreme Court of the United States

October Term, 1985

PAUL HENRY EISENBERGER,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Paul Henry Eisenberger, was indicted during the January Term, 1984 in the Superior Court of Cobb County, Georgia, for the offense of an improper lane usage because the Petitioner drove over the right lane dividing line without signaling and without ascertaining whether such movement was safe. (R. 4-6). The Petitioner was also indicted for trafficking in marijuana by knowingly possessing over 2,000 pounds of said substance. *Id.*

Prior to trial, the Petitioner filed a motion to suppress the introduction of evidence of all kinds pertaining

to the discovery of the approximately 2,784 pounds of marijuana, claiming that the illegal substance had been discovered pursuant to a pretextual stop by police authorities, and not pursuant to a lawful stop because of a traffic violation. (R. 54-55). After an extensive hearing on the motion to suppress, the trial court denied the Petitioner's request finding that Petitioner had been legitimately stopped by the authorities pursuant to his violation of Georgia law, and that the subsequent police search of the vehicle, under the totality of the circumstances, was lawful. (R. 66-67). Accordingly, no violation of the Petitioner's Fourth Amendment right against unreasonable search and seizure had occurred. *Id.*

Subsequent to the Petitioner's conviction for both indicted offenses, the Petitioner appealed his conviction to the Court of Appeals for the State of Georgia, challenging the sufficiency of the evidence supporting his traffic violation conviction, as well as again raising his claim that the marijuana had been discovered pursuant to a pretextual stop. *Eisenberger v. State,* 177 Ga. App. 673, — S.E.2d — (1986). The Court of Appeals rejected both of these contentions and the Petitioner's application for certiorari from the Georgia Supreme Court was also denied. The Petitioner now seeks a writ of certiorari from this Court to review that decision by the Court of Appeals for the State of Georgia.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS FOR THE STATE OF GEORGIA CORRECTLY DETERMINED THAT THE PETITIONER'S MOTION TO SUPPRESS HAD BEEN PROPERLY DENIED AS THE MARIJUANA IN THE PETITIONER'S POSSESSION WAS LAWFULLY DISCOVERED PURSUANT TO A VALID SEARCH INCIDENT TO A LAWFUL TRAFFIC ARREST.

Petitioner contends that his initial stop by Georgia police authorities was merely a pretext to permit the officers to search the Petitioner's vehicle for suspected marijuana. The Petitioner maintains that such a pretextual stop was a violation of his rights under the Fourth Amendment and justified the suppression of the evidence regarding marijuana trafficking at his trial. However, the Respondent notes that both the trial court and the Court of Appeals for the State of Georgia rejected the Petitioner's claims that his initial stop was merely a pretext, and instead found that the Petitioner had in fact committed a traffic violation which lead to the subsequent stop and discovery of the marijuana. Respondent urges this Court to reject the Petitioner's request that this Court make new, factual determinations regarding the motivations of the Georgia police authorities and requests this Court to deny certiorari in the instant case.

As demonstrated at the hearing on the motion to suppress, Georgia Bureau of Investigation (G.B.I.) agents originally began surveillance of the Petitioner, and his motor home with Kentucky license plates, after the Peti-

tioner had met with a known drug smuggler in Gainesville, Florida. (M.H.T. 10, 24). After this meeting with the drug smuggler, the Petitioner then proceeded north through the state of Georgia on Interstate 75. *Id.* at 9. G.B.I. Agent John Lang was summoned to assist in the surveillance of the Petitioner as the Petitioner passed through the city of Atlanta at approximately 1:00 a.m. on January 17, 1984. *Id.* at 9-10. Agent Lang personally observed the Petitioner's motor home and testified that it was "obviously gross (sic) overweight", that the vehicle would sway from side to side in a slow, rolling motion indicating great weight and that it was apparently very difficult to control. *Id.* at 12, 25-26. Agent Lang also personally observed, "the vehicle veer out into the left lane and then back onto the right lane" as it drove north on the interstate. *Id.* at 13. Any stop of the suspicious vehicle, Agent Lang testified, was originally intended to merely identify the driver. *Id.* at 34.

G.B.I. Agent Mark P. Jackson also participated in the surveillance of the Petitioner's vehicle. *Id.* at 59-61. Agent Jackson testified that the vehicle appeared to be heavily weighted, swayed back and forth and appeared to have difficulty staying in the traveling lane of the interstate. *Id.* at 61, 77, 79. According to Agent Jackson, the Petitioner's appearance as a lone traveler in a van, driving late at night at a relatively slow speed and apparently heavily weighted, fit the profile of a drug smuggler. *Id.* at 62, 77. Agent Jackson also personally observed the Petitioner's motor vehicle on a number of occasions swerve from one lane to another, almost as if the driver was under the influence of alcohol. *Id.* at 64.

As the Georgia Bureau of Investigation agents were traveling in unmarked cars, assistance was requested from the Georgia State Highway Patrol in their surveillance of the Petitioner's vehicle. *Id.* at 11, 63, 93. Trooper Marion Rigo and Captain Harper answered that call for assistance in their patrol car and began surveillance of the Petitioner's vehicle. *Id.* at 94-95. Trooper Rigo personally observed the Petitioner's vehicle cross lane dividers "as if he didn't know which lane to go into, because he then changed to the right-hand lane with no turn signal." *Id.* at 95. Trooper Rigo originally had suspected that the driver of the vehicle had been drinking or was going to sleep at the wheel. *Id.* at 97, 98. The Georgia State Patrol trooper also observed the Petitioner's vehicle cut off another vehicle in changing lanes, and observed that the Petitioner used no directional signals at all. *Id.* at 97, 109. At this time, Trooper Rigo testified that the G.B.I. surveillance vehicles were back quite away from the Petitioner's van. *Id.*

After personally observing these violations of Georgia law, the troopers had the Petitioner pull his vehicle to the side of the interstate. *Id.* at 96-97, 98-99. The G.B.I. agents also then pulled to the side of the road. *Id.* at 14, 32-33, 65-66.

The Court of Appeals for the State of Georgia found that there was sufficient evidence to enable a rational trier of fact to find that the Petitioner was in fact guilty of improper lane usage in violation of O.C.G.A. § 40-6-123 beyond a reasonable doubt, and that the stopping of Petitioner's vehicle was justified and not a pretext. *Eisenberger v. State*, 177 Ga. App. at 674.

Subsequent to the Petitioner's stop by the police authorities, the Petitioner's driver's license and registration were examined by the Georgia State Patrol troopers. (M.H.T. 99-101). At this time, both G.B.I. agents Lang and Jackson detected the strong odor of marijuana coming from the Petitioner's vehicle. *Id.* at 16, 39, 70. The Petitioner by this time appeared extremely nervous. *Id.* at 68. The Petitioner then lied to the G.B.I. agents, saying that his family was sleeping inside the van and that he did not want them awakened. *Id.* at 15-17, 39, 67-68, 151. By that time, the Georgia State Patrol troopers had learned that the Petitioner's vehicle was registered to someone other than the Petitioner. *Id.* at 100. The Petitioner then became so belligerent that the agents and officers feared a fight would break out on the shoulder of the interstate, which they considered dangerous given the passing traffic on the interstate. *Id.* at 67-68. Petitioner was then placed in the back of the Georgia State Patrol car. *Id.* at 14, 39, 101-02.

As the Petitioner had stated that his family was still in the van, the G.B.I. agents then entered the Petitioner's vehicle to determine if there were any occupants and to investigate the strong, marijuana smell. *Id.* at 18, 42, 43, 72. At that time, fifty-three bales of marijuana, weighing approximately 2,784 pounds, were discovered in the vehicle and the Petitioner was arrested for a violation of the Georgia Controlled Substance Act. *Id.* at 16, 45-46, 49, 72-73. No other persons were found in the vehicle. *Id.* at 18, 45-46.

The trial court in reviewing these circumstances and the motion to suppress found that the search of the Petitioner's vehicle was justified on the basis of the automobile exception to the warrant requirement. (R. 66). In reviewing this Court's decision in *United States v. Ross*, 456 U.S. 798 (1982), the trial court found that the search of the Petitioner's vehicle, after the legitimate stop of the camper, was permissible. *Id.* The initial stop by the Georgia State Patrol pursuant to a traffic violation had been lawful and proper and a citation had been issued for a violation of O.C.G.A. § 40-6-48, an improper lane usage. *Id.* at 67.

Additionally, in reviewing the totality of the circumstances, pursuant to this Court's decision in *Illinois v. Gates*, 462 U.S. 213 (1983), the trial court found that there was probable cause to search the Petitioner's vehicle. *Id.* The G.B.I. agents had observed the Petitioner meeting with a known smuggler, had observed the heavily loaded vehicle swaying from side to side on the road and had detected the smell of marijuana coming from the van. *Id.* Accordingly, the Petitioner's motion to suppress was denied. *Id.*

On direct appeal, the Court of Appeals concurred in this decision, not only finding that the original stop of the Petitioner was not a pretext, but further holding that the stop of the Petitioner's vehicle was authorized based on the existence of a reasonable and articulable suspicion that the Petitioner's vehicle was being used to transport marijuana. *Eisenberger v. State*, 177 Ga. App. at 674(2). Under *Adams v. Williams*, 407 U.S. 143, 146 (1971), the Court of Appeals for the State of Georgia correctly noted

that, "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 675. Accordingly, the Court of Appeals for the State of Georgia concluded that under all of the circumstances, the trial court was clearly authorized to conclude that the initial stop of the vehicle was not arbitrary or harassing and also concluded that, independent of the traffic violation, there was sufficient reason to stop the Petitioner's vehicle. *Id.*

As both the trial court and the Court of Appeals for the State of Georgia had determined that Petitioner's traffic violation did in fact occur and was not merely a pretext for the police stop, the instant case is readily distinguishable from the case of *State v. Blair,* 691 S.W.2d 259 (Mo. banc 1985), which this Court has granted certiorari to review. *Missouri v. Blair,* — U.S. —, 106 S.Ct. 784 (1986). In *Blair* both the trial court and the Supreme Court of Missouri agreed in the factual determination that Blair's original arrest for a parking violation was pretext to gather evidence regarding an unrelated offense. *State v. Blair,* 691 S.W.2d at 262-63. As previously noted, in the instant case neither the trial court nor the Court of Appeals for the State of Georgia has made such a factual determination, but instead both have found that the original stop of the Petitioner by police authorities was justified by the Petitioner's violation of Georgia law. Additionally, as both of the lower courts have correctly determined, once the Petitioner was lawfully stopped for a violation of Georgia law, the subsequent search of the Peitioner's vehicle was permitted under this Court's de-

cision in *United States v. Ross, supra,* as well as being supported by the reasonable and articulable suspicion by the officers that the Petitioner was in fact trafficking in marijuana.

Accordingly, for all of the above and foregoing reasons, Respondent asserts that the Petitioner has failed to present any substantive issue of federal law which would warrant review by this Court.

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CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia, as it is manifest that there is no substantial federal question not previously decided by this Court and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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